

Hemmingway (Migration) [2018] AATA 2452 (20 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Bruce James Hemmingway
VISA APPLICANT:	Ms Hsiu-Chen Lin
CASE NUMBER:	1703885
DIBP REFERENCE(S):	OSF2016/039819
MEMBER:	Maira Brophy
DATE:	20 June 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 20 June 2018 at 4:12pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) – Subclass 309 (Partner Provisional) visa – Continuing Genuine spousal relationship – Live separately in different countries – Plans to establish a joint household – Represent themselves as married to others – Vague evidence – Details of review applicant's family and finances – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359AA

Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 309.211, 309.221, 309.321

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 February 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 7 February 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl. 309.221 because the delegate was not satisfied the parties were in a genuine and continuing relationship and as a consequence the secondary applicant was not able to meet the legal requirements.
4. The review applicant, Mr Bruce Hemingway appeared before the Tribunal on 9 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant Ms Hsiu-Chen Lin and from Ms Kylie Jacob, daughter of the sponsor.
5. The review applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

Background

7. The visa applicant is a 51 year old female from China who lived in Taiwan prior to coming to Australia and since leaving Australia she has lived in New Zealand. She was previously married to Debiaq He in the period from 18 September 1978 (sic) to 2000 when the parties divorced. There are two children of the marriage born in 1988 and 1990. She was then married to Jian Ming Ying in the period from 13 August 2001 until he died on 21 July 2010. The visa applicant's father is deceased, her mother, two sisters and two brothers reside in China.
8. The review applicant is a 74 year old male living in Central Coast, Australia. He was previously married to Robin Hemingway in the period from October 1970 to 27 July 2009. There were two daughters of the marriage. His parents are deceased; he has one brother and one sister living in Australia.
9. At the time of the application the parties stated they met at the Tuggerah Remedial Therapy Centre in June 2013. They commenced an intimate relationship in March 2014. In February 2015 they committed to a shared life to the exclusion of all others when the applicant moved in to live with the review applicant at his home. They were married on 7 June 2015.
10. The delegate who made the original decision noted the following issues:

- There was no evidence the parties had continued since application to be in a genuine and continuing relationship.

Tribunal Proceedings

11. The issue in the present case is whether the visa and review applicants were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
12. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the review applicant and the visa applicant at the hearing.
13. There were a number of inconsistencies in the applicant's oral evidence as to financial matters and whether the first husband of the applicant was deceased and these were put to the applicant at the hearing in accordance with section 359AA of the Act. The Tribunal explained the relevance and the consequences of relying on that information in terms of his credibility.

14. Whether the parties are in a spouse or de facto relationship

15. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 7 June 2015 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial Aspects of the relationship

18. The review applicant resides in his own home in Tuggerah. It is a 3 bedroom house on 12 acres. He purchased the property some 15 years ago in his name alone and estimates it would be valued at around \$800,000. The review applicant said he retired from paid employment in 2007. He had been self-employed as a tip truck owner/operator. He is a self-

funded retiree and receives a part pension from Centrelink. As well as his superannuation he has life insurance and his two daughters are the beneficiaries of these policies.

19. The visa applicant was currently living in Auckland, New Zealand. She is working two days a week in a massage shop and studying English. She is living in rented accommodation with a friend.
20. The parties do not hold any joint assets or liabilities. Neither party owes any legal obligation to the other party.
21. The Tribunal accepts from the evidence provided that the review applicant has given money to the visa applicant to assist her whenever he has visited her. They do not share day-to-day household expenses and each maintains their own bank accounts for day to day expenses. This is not unusual given the review applicant is in Australia and the visa applicant is in New Zealand.
22. The Tribunal places limited weight on this aspect of the relationship.

Nature of the Household

23. It is accepted the parties have spent around eight months as part of the one household since their marriage in June 2015. The Tribunal accepts that when the review applicant went to China and Taiwan in 2016 he stayed at the home of the visa applicant. The review applicant also stayed with the visa applicant for in New Zealand on the four occasions he has visited her there.
24. The parties do not have any joint responsibility for the care and support of children.
25. The parties gave evidence of when they were together they would both do washing and cleaning and the review applicant would help with the heavier household chores. The parties stated they mostly ate out because the review applicant does not like Chinese food and the visa applicant does not like Western foods. The parties gave consistent evidence about their plans to establish a joint household at the home owned by the review applicant. The Tribunal places limited weight on this aspect of the relationship given the very limited periods of cohabitation since marriage.

Social aspects of the relationship

26. At the time of application the visa applicant provided the following:
 - A statutory declaration dated 23 October 2015 from Kay Francis Watson. She stated she had known the visa applicant for 12 months and the sponsor for 30 years. She opined that she considered the relationship to be genuine and continuing.
 - A statutory declaration dated 28 October 2015 from Kylie Louise Jacob, daughter of the review applicant who attested to the fact she had known the review applicant since birth and the visa applicant for two years when she was introduced to her by her father. She stated that she had observed the contact between the parties and their growing relationship. She considered the relationship to be genuine and continuing and noted her father seemed very happy.
27. At the time of hearing the daughter of the review applicant Kylie Jacobs who had previously given a written statement gave oral evidence. She gave evidence she had met the visa

applicant on several occasions. She described her as being very caring and committed to her father and opined she was very enthusiastic about knowing his daughters and their families. She said her father seemed very happy and contented since he and the visa applicant had married.

28. Based on the evidence available to it, the Tribunal accepts that the parties represent themselves to their families as being married to each other and that their immediate family members consider them to be in a genuine and continuing spousal relationship.

Nature of the relationship

29. The evidence as to the parties commitment to each other was, when considered in its totality confused and unconvincing. Both parties spoke quite openly of the fact they took the decision to marry on 22 August 2014 because it enabled the visa applicant to regularise her visa status. The Tribunal was in no doubt that the visa application was an integral part of the visa applicant's decision to marry. While at the time of hearing the review applicant spoke of his commitment to the marriage and of establishing a life together with the visa applicant the Tribunal was not convinced on the evidence that commitment to the marriage was a mutual commitment.
30. The visa applicant was not able to give details with any specificity of the review applicant's family or financial arrangements. The Tribunal is not satisfied the explanation for the visa applicant's lack of knowledge as to personal circumstances of the review applicant was plausible in the context of two people committed to a shared life. In the context of parties being separated the Tribunal regards information about each other's living arrangements to be of importance when assessing the nature of the commitment of the parties to the relationship.
31. The Tribunal was concerned the visa applicant was deliberately vague and evasive when giving her evidence in an attempt to avoid scrutiny. Her evidence was not indicative of a person in a committed relationship. Her evidence as to her first husband being in goal and the circumstances surrounding her knowledge of that were in the Tribunal's view implausible.
32. The Tribunal regarded the cumulative effect of the inconsistencies in the evidence of the visa applicant combined with her persistent evasiveness when asked questions to be indicative of the relationship not being characterised by a mutual commitment to a shared life together. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would. When this evidence was considered along with the conduct of the parties in not spending any significant periods of time with each other since their marriage the Tribunal was not satisfied both parties saw the relationship as long-term.
33. The Tribunal finds that the parties know each other personally, have socialised together on the limited occasions when the review applicant was in China. The Tribunal is satisfied there is ongoing communication between the parties. However, the Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine spousal relationship. The Tribunal is not satisfied on the evidence that the visa applicant is committed to a shared life as husband and wife to the exclusion of all others.

CONCLUSION

34. Given the above findings, the Tribunal is not satisfied that at the time the visa application was lodged and at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is not satisfied that the parties live together or do not

live separately and apart on a permanent basis. The Tribunal therefore finds that the visa applicant does not meet the definition of 'spouse' in s.5F (2) (b)-(d).

35. As the parties were married at the time of application, the applicant cannot satisfy cl.309.211 (3).
36. As the visa applicant does not meet the definition of spouse he does not meet the requirements of cl.309.211 or cl.309.221.
37. As the visa applicant does not meet the requirements of cl.309.211 and cl.309.221 the additional applicant does not meet the requirements of cl 309.321.
38. For the reasons above, the Tribunal finds the visa applicant and the additional applicant does not satisfy the criteria for the grant of the visa.

DECISION

39. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Moirá Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).